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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5961

EDGAR ROSS,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

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Petitioner Edgar Ross respectfully prays that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois, First District, affirming the judgment of the Circuit Court of Cook County. The judgment of the Circuit Court of Cook County is not reported. The opinion of the Appellate Court is reported at 11 Ill. App. 3d 650, 297 N.E. 2d 328 (1973). The opinion of the Appellate Court is included as an appendix to this petition. The order of the Supreme Court of Illinois denying the petition for leave to appeal without opinion is not officially reported.

JURISDICTION.

The judgment of the Appellate Court of Illinois was entered on April 18, 1973. A Petition for Leave to Appeal to the Supreme Court of Illinois was timely filed and denied on September 26, 1973. The jurisdiction of this Court is invoked under and pursuant to 28 U.S.C. Sec. 1257(3).

QUESTION PRESENTED.

Whether the federal harmless-constitutional-error rule prohibits affirmance of petitioner's conviction where the evidence was evenly balanced and the prosecutor deliberately introduced in evidence, and argued an inference of guilt from, petitioner's reliance on his Fifth Amendment privilege against self-incrimination when confronted by his accuser during a line-up identification.

CONSTITUTIONAL PROVISIONS INVOLVED.

Fifth Amendment to the Constitution of the United States:

"No person . . . shall be compelled in a criminal case to be a witness against himself . . ."

STATEMENT.

Petitioner was charged by the Cook County, Illinois Grand Jury with the offenses of murder and armed robbery. A jury returned a verdict of guilty on both charges and petitioner was sentenced to a term of 70 to 100 years in the Illinois State Penitentiary.

On January 10, 1969 at 10:00 a.m two armed, masked men held up a restaurant at 5430 South State Street in Chicago. The shorter of the two men had his face completely covered. The taller robber wore a mask or scarf that covered his entire face below his ears. (A. 8-12)*

The shorter man remained in the front of the restaurant, shot and killed a customer and took $80 from Gladys Ambrose, the manager of the restaurant. The taller of the two men, who was wearing a khaki jacket, moved to the rear of the restaurant and remained there throughout the robbery. Petitioner was accused of being the man in the rear of the restaurant.

During the robbery Mrs. Ambrose watched the shorter robber, who apparently was never apprehended, shoot and kill the customer. The shorter robber then moved over to where she stood behind the cash register and demanded money. He took $80. She had focused her attention on the shorter man as he shot the deceased and took the money. (A. 8-12)

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* References are to the Abstract of Record filed in the lower Court and transmitted here as part of the certified record.

Although at the trial the manager of the restaurant claimed that she recognized petitioner as one of her customers by his stature and build, (A. 8) she testified at the trial that there was nothing unusual about his stature. (A. 9) Nor did she tell the police at that time that she knew petitioner from the neighborhood.

Two months later after the robbery Mrs. Ambrose identified a photograph of petitioner as a photograph of the robber. She then claimed to have known petitioner as a customer of the restaurant. (A. 6-7) The photographs were also shown to Sam Franklin, who picked out petitioner's picture. (A. 14)

After petitioner was arrested, a line-up was conducted and Gladys Ambrose identified petitioner as the taller of the two men who committed the robbery. The other identifying witness at the trial, Sam Franklin, who had picked out petitioner's picture, did not identify petitioner as one of the robbers at the line-up, (A. 22) but later claimed that he did not do so because he was afraid. (A. 15-16) Franklin also claimed he recognized petitioner from the neighborhood, but there is nothing to indicate that he ever told this to the police. (A. 12)

Maurice Hall, who was also present as a customer during the robbery, testified as a defense witness that there were three men, involved in the robbery and that he was unable to identify the taller man in the rear of the restaurant because "not very much" of his face was showing. (A. 25-26)

Petitioner testified that he did not commit the robbery and was at home when the crime was committed.

Petitioner's mother also testified that petitioner was at home at the time of the offense. (A. 28-32)

During the course of the trial the prosecutor elicited from three witnesses that petitioner had relied upon his Fifth Amendment privilege and the advise of counsel when confronted and accused by Gladys Ambrose at the line-up. After she testified that she picked petitioner out of a line-up, Gladys Ambrose was asked, "And when you viewed the defendant, Edgar Ross, did Mr. Ross say anything to you?" She answered that he did not. A police officer who conducted the line-up also testified on direct examination by the prosecutor that Mrs. Ambrose identified petitioner and that he did not recall petitioner saying anything. (A. 22)

During cross examination of petitioner, the prosecutor again asked if petitioner had said anything when he was recognized by Gladys Ambrose and elicited the response, "No, I was instructed that anything I said would be held against me." (A. 33)

In closing argument the prosecutor argued (A. 51):

> "You heard the Defendant say that he knew Mrs. Ambrose. You also heard him say he saw Mrs. Ambrose in April, sometime around the 23rd in a lineup. He also knew he was identified by this woman that he recognized. He knew that Mrs. Ambrose would identify him. Did he say anything? Did he say, 'Mrs. Ambrose, what are you doing, it is not me? Why are you picking me out? I know you, Mrs. Ambrose, don't you know me?' He didn't say anything to Mrs. Ambrose: 1, because he knew why Mrs. Ambrose was picking him out; 2, because he wanted to remain inconspicuous as

possible. He tells us he didn't have to—he was informed that he did not have to say anything, that is probably correct, he does not have to say anything." (A. 51)

On appeal to the Appellate Court of Illinois, First District, petitioner argued that the evidence of and comment on the fact that he relied on his Fifth Amendment privilege denied him a fair trial. The Appellate Court considered the issue on the merits and affirmed. As to the contention raised in this petition, the court said:

> Defendant's third contention on appeal was that his Fifth Amendment rights were denied when the prosecution introduced evidence that the defendant remained silent at a lineup and the prosecutor argued to the jury that defendant's silence was evidence of his guilt. Both the defendant and Officer Nimocks testified that the defendant was told that he could remain silent at the lineup. This testimony fully explained to the jury that the defendant was instructed to remain silent at the lineup. The trial court improperly admitted evidence of defendant's silence, but this error did not contribute to the finding of guilty and therefore was not prejudicial error. (297 N.E.2d 328, 330)

The question was raised again in a Petition for Leave to Appeal to the Illinois Supreme Court, which was denied.

REASONS FOR GRANTING THE WRIT.

The Lower Court Erroneously Applied The Federal Harmless-Constitutional-Error Rule In Holding That The Deliberate Use By The Prosecutor Of Petitioner's Reliance On His Fifth Amendment Privilege When Confronted By His Accused At A Pretrial Line-up Did Not Affect The Result In A Close Case.

The prosecutor's improper elicitation of the fact that defendant relied upon his Fifth Amendment privilege in the face of accusation compounded by his argument to the jury that if innocent, defendant would have spoken out, violated his Fifth Amendment privilege against self-incrimination and deprived him of a fair trial. *Griffin* v. *California,* 380 U.S. 609 (1965). The error was not harmless under the federal harmless-constitutional-error rule because there was a reasonable and substantial possibility that the evidence complained of contributed to the conviction. *Chapman* v. *California,* 386 U.S. 18 (1967) Moreover, the State did not and could not show that the untainted evidence provided such overwhelming support for the conviction so as to render the error harmless beyond a reasonable doubt. *Harrington* v. *California,* 393 U.S. 250 (1969).

The finding of the Appellate Court of Illinois that the improperly admitted evidence and comment on petitioner's silence did not contribute to the jury verdict of guilty is inconsistent with this Court's decisions in both *Chapman* v. *California,* 386 U.S. 18 (1967) and *Harrington* v. *California,* 393 U.S. 250 (1969).

A brief comparison of the facts is necessary to illustrate the absence of any support for the decision below. First,

it is agreed that petitioner's rights under the Fifth Amendment and *Miranda* v. *Arizona*, 384 U.S. 436 (1966) were violated when the prosecutor successfully placed before the jury and commented on petitioner's exercising his Fifth Amendment privilege in the face of accusation. See *Miranda* v. *Arizona*, 384 U.S. 436, 468, fn. 37 (1966).

Secondly, the evidence in this case evenly balanced and ". . . the question of guilt or innocence [was] a close one." *Chapman* v. *California*, 386 U.S. 18, 22-23. Here the identification of the shorter robber was in issue. Although petitioner was identified at the trial by Mrs. Ambrose as a person she had seen prior to the robbery, she never told this to the police until after she had picked petitioner's picture out of a mug book, raising the distinct possibility that she mistakenly identified a person she had seen previously in the neighborhood. See WALL, *Eye-Witness Identification In Criminal Cases*, 119-121, relied upon in *United States* v. *Wade*, 388 U.S. 218 (1967), for a discussion of identifications based upon familiar associations where a victim identifies a person based upon a past experience totally unrelated to the crime.

In addition, the second identifying witness failed to identify petitioner at a line-up after his arrest. Although at the trial he testified that he had recognized petitioner but failed to tell the police because he was "afraid," his testimony is seriously open to question by reason of the fact that he likewise never told the police he recognized petitioner.

Further enhancing the possibility of misidentification is the fact that a third person at the scene testified that the robber's face was covered so that he could not make an identification.

In his defense, petitioner and another witness testified that he was home at the time. He was not impeached by previous convictions.

Although resolution of the factual issue was for the jury, the foregoing evidence can hardly be characterized as overwhelming. The evidence was evenly balanced and the issue was close. Under the circumstances, testimony that petitioner relied upon his Fifth Amendment privilege when confronted by the person he allegedly robbed at the line-up was highly damaging. At this initial and critical confrontation at which petitioner could have been exonerated, the prosecutor later argued to the jury, petitioner would have spoken out if he had been innocent. As this Court noted in *Chapman* v. *California,* the prosecutor's comment was "calculated to make petitioner's version of the evidence worthless [and] can no more be considered harmless than the introduction of a coerced confession." (386 U.S. 18, 26)

This is simply not the type of case which this Court had in mind in *Chapman,* where this Court said that the State harmless error rules:

> "Serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." (386 U.S. 18, 22)

The Court went on to caution against the unfair and mischievous results which we now see in application of the harmless-error rule:

> "In fashioning a harmless-constitutional-error rule, we must recognize that harmless-error rules can work very unfair and mischievous results when, for example, highly important and persuasive evidence, or argu-

ment, though legally forbidden, finds its way into a trial in which the question of guilty or innocence is a close one." (386 U.S. 18, 22-23)

In this case, as in *Chapman*, ". . . absent the constitutionally forbidden comments, honest, fair-minded jurors might very well have brought in not guilty verdicts." (386 U.S. 18, 25-26)

The rule of *Chapman* was later applied in *Harrington* v. *California*, 395 U.S. 250, where the Court further explicated the rule of *Chapman* and held that ". . . the case against Harrington was so overwhelming that we can conclude that this violation of Bruton was harmless beyond a reasonable doubt . . ." (*Harrington* v. *California*, 395 U.S. 250, 254)

The proper application of the harmless error rule is illustrated by *Schneble* v. *Florida*, 405 U.S. 427 (1972) where this Court held that evidence admitted in violation of *Bruton* v. *United States*, 391 U.S. 123 (1968) was harmless beyond a reasonable doubt. In reaching this conclusion, this Court pointed to the overwhelming evidence which was properly admitted, including petitioner's comprehensive confession. No such confession exists in the instant case, nor is the other evidence at all overwhelming.

Although purporting to apply the harmless-error rule, the decision of the Appellate Court is wrong. The Appellate Court exceeds the permissible scope of the federal harmlesss-error-rule and sets itself up as a super-jury to review the facts and determine on its own the credibility of the witnesses instead of leaving that function to a jury at a trial untainted by evidence and comment on refusal of the accused to make a statement.

Finally the harmless error rule should be limited to legitimate trial errors or mistakes. In this case there was no mistake. The prosecutor's use of the improper evidence was deliberate and calculated. Reliance on the harmless error rule in such circumstances makes a mockery of the administration of criminal justice and invites further abuse. The Fifth Amendment does not say that defendant's privilege against self-incrimination will be respected except where there are two "positive" eye-witnesses. The privilege cannot be watered down by looking to the strength of the remaining evidence. To allow the State to invoke the harmless error rule in cases such as this is to invite deliberate and calculated abuse by prosecutors who hope to obtain a conviction in a weak case and who then seek to excuse their conduct on appeal on grounds that it was "harmless."

The conclusion of the Appellate Court that the error did not affect the outcome of the trial is totally unsupported by a reading of the record and by comparison of the facts of this case with the overwhelming evidence present in *Harrington* and *Schneble*. As in those cases, we urge that this Court determine on the basis of its own reading what seems to have been "the probable impact . . . on the minds of an average jury" in a close case of the prosecutor's improper reliance on petitioner's failure to make a statement as evidence of guilt. (*Harrington* v. *California*, 395 U.S. at 254, quoted in *Schneble* v. *Florida*, 405 U.S. 427, 431)

CONCLUSION.

For the reasons urged herein, it is respectfully requested that a writ of certiorari issue to review and reverse the judgment of the Appellate Court of Illinois, First District, entered herein.

Respectfully submitted.

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December 21, 1973

APPENDIX

Opinion of the Appellate Court of Illinois

Mr. Justice Adesko delivered the opinion of the court:

After a jury trial, Edgar Ross was found guilty of murder and armed robbery. The trial court sentenced the defendant to the Illinois State Penitentiary for a period of not less than 70 years nor more than 100 years. On appeal defendant contends:

(1) He was not proven guilty beyond a reasonable doubt;

(2) The trial court erred by allowing into evidence the police officer's testimony that the identifying witnesses had made prior out of court identifications of the defendant;

(3) His Fifth Amendment rights were denied when the prosecution introduced evidence that the defendant remained silent at a lineup and the prosecutor also argued to the jury that defendant's silence was evidence of his guilt;

(4) Prosecutor's closing argument was so prejudicial as to deny defendant's right to a fair trial; and

(5) He was denied the effective assistance of counsel.

The facts are as follows:

On January 10, 1969, at approximately 10:00 p.m., two men entered D.D.'s Bar-B-Q at 5430 South State Street, Chicago, Illinois. The shorter of the two men announced a stickup and fatally shot James Blay, a customer, when

he failed to move quickly. The taller assailant was in the rear of the restaurant with his gun drawn during the robbery. Gladys Ambrose, manager of the restaurant, identified the defendant as the taller assailant. She testified that defendant wore a mask which hung from the top of his nose and a khaki jacket. She further testified that she was able to identify the defendant because of his physique. Sam Franklin, a customer of the restaurant, testified that the defendant was wearing a green army field jacket.

Defendant and his mother testified that he was home at the time the crime was committed. Maurice Hall, a customer of the restaurant who was present at the robbery, testified that he was unable to identify the defendant as the taller robber. Defendant's first contention on appeal was that he was not proven guilty beyond a reasonable doubt. The basis for defendant's contention was that the testimony of the two identifying witnesses was weak and conflicting.

Gladys Ambrose testified that she knew the defendant and had seen him before. Ambrose had ample time to view the defendant at the time of the robbery and was able to identify him because of his physique and the upper part of his face which was not covered by the mask. Sam Franklin also identified the defendant. The defendant was positively identified by two witnesses. Furthemore, the fact that the defendant produced an alibi, supported by one witness does not, in and of itself, constitute reasonable doubt of his guilt. Conflicts in the testimony are to be resolved by the trier of fact who is not obliged to believe the alibi testimony of the defendant and his mother over the positive identification of Ambrose and Franklin. *People* v.

Setzke, 22 Ill. 2d 582, 586, 177 N.E. 2d 168. The trier of fact makes the determination of the witnesses' credibility and we find that the evidence is not so unsatisfactory as to create a reasonable doubt of defendant's guilt. That determination will not be disturbed. *People* v. *Holt,* 124 Ill. App. 2d 198, 201, 260 N.E. 2d 291.

Defendant's second contention on appeal was that the trial court erred by allowing into evidence the police officer's testimony that the identifying witnesses had made prior out of court identification of the defendant. As the court in *People* v. *Williams,* 117 Ill.App. 2d 34, 44, 254 N.E. 2d 81, stated:

> "There was no objection to this testimony at the trial, so any error which may have occurred in its admission is deemed to have been waived. *People* v. *Dial,* 95 Ill.App. 2d 345, 238 N.E. 2d 122; *People* v. *Hester,* 49 Ill. App. 2d 308, 200 N.E. 2d 3. Even if hearsay testimony had been improperly admitted reversal is not warranted where the same matter has been proved by independent and properly admitted evidence. *People* v. *Frenchwood,* 28 Ill. 2d 139, 190 N.E. 2d 767. The identification testimony of the robbery victims in this case was sufficient to render the officer's testimony mere surplusage, and we find that no prejudice resulted therefrom."

In the case at bar, the identification testimony of Ambrose and Franklin was sufficient to render the officer's testimony mere surplusage, and we find that no prejudice resulted therefrom.

Defendant's third contention on appeal was that his Fifth Amendment rights were denied when the prosecution in-

troduced evidence that the defendant remained silent at a lineup and the prosecutor argued to the jury that defendant's silence was evidence of his guilt. Both the defendant and Officer Nimocks testified that the defendant was told that he could remain silent at the lineup. This testimony fully explained to the jury that the defendant was instructed to remain silent at the lineup. The trial court improperly admitted evidence of defendant's silence, but this error did not contribute to the finding of guilty and therefore was not prejudicial error.

Defendant's fourth contention on appeal was that the prosecutor's closing argument to the jury deprived him of a fair trial. Defendant alleges that the prosecutor evoked sympathy for the deceased in order to arouse the jurors' passions against the defendant and that the prosecutor suggested that the defendant intimidated the prosecution witnesses and therefore he should be incarcerated in order to protect the witnesses. It has been said many times that arguments and statements based on the proof or legitimate inferences deductible therefrom do not transcend the bounds of legitimate argument and it is perfectly proper for the prosecutor to dwell upon the evils of crime. *People* v. *Hairston,* 46 Ill. 2d 348, 375, 263 N.E. 2d 840. We have read the prosecutor's closing arguments in their entirety, with particular attention to the isolated excerpts of which complaint is made, and conclude that the bounds of proper argument were not exceeded.

Defendant's fifth contention on appeal was that he was denied effective assistance of counsel.

> "We consider there is no basis to the defendant's claim that he did not at trial have the effective as-

sistance of counsel. Where, as here, an accused has retained counsel of his own choice this court has observed: "[H]is judgment of conviction will not be reversed merely because his counsel failed to exercise the greatest skill or for the reason that it might appear, in looking back over the trial, that he had made some tactical blunder. [Citations] This court has said that ordinarily a defendant who retains counsel of his own selection is responsible if that counsel does not faithfully serve his interests; that any other rule would put a premium upon pretended incompetence of counsel, for if the rule were otherwise, a lawyer with a desperate case would have only to neglect it in order to insure reversal or vacation of the conviction.' *People* v. *Stephens*, 6 Ill. 2d 257, 259.) Thus, a defendant will not, unless the representation was so inadequate as to reduce a proceeding to a farce (*People* v. *Nelson*, 42 Ill. 2d 172), be heard to complain of his retained counsel." *People* v. *Fleming*, 50 Ill. 2d 141, 145, 277 N.E. 2d 872.

We have reviewed the entire record in our consideration of defendant's claim that he was denied effective assistance of counsel and find that the representation by counsel of defendant's choice was not of such low caliber as to amount to no representation at all, or to reduce the court proceedings to a farce or a sham. *People* v. *Hogan*, 7 Ill. App. 3d 689, 690, 288 N.E. 2d 486. Although defense counsel did not make a motion to suppress the identification testimony, he effectively cross-examined the two identifying witnesses and presented a witness to the robbery who stated that he was unable to identify the defendant. Defense counsel also

presented an alibi defense witness. We believe the charge of ineffective assistance of counsel is not supported by the record.

For the reasons given, the judgment of the Circuit Court of Cook County is affirmed.

Judgment Affirmed.

BURMAN, P.J., and DIERINGER, J., concur.